

September 24, 2004

EX PARTE – Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of the Local Competition Provisions of the
Telecommunications Act of 1996*, CC Docket No. 96-98;
Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68;

Dear Ms. Dortch:

On September 23, 2004, on behalf of Level 3 Communications LLC (“Level 3”), Ms. Cindy Schonhaut, of Level 3, and I met with Christopher Libertelli, Senior Legal Advisor to Chairman Powell; Aaron Goldberger; Christopher Killion; John Stanley; and Nick Bourne, and separately with Matthew Brill, Senior Legal Adviser to Commissioner Abernathy. In the meeting, we discussed the legal issues with respect to the scope of the Commission’s authority under Sections 251(b)(5) and 252, as set forth in my letter on behalf of Level 3 dated September 13, 2004, as well as the practical issues raised by a Section 201 only approach, as further set forth in my letter on behalf of Level 3 dated September 10, 2004 (CC Docket Nos. 96-98, 99-68).

We further stated that the Commission should not pursue a hypothetical legal theory in which it would find that Section 252(d)’s pricing standards did not apply to any services that fell within the Commission’s Section 201 jurisdiction. Such an approach would potentially lead to different prices for interconnection, unbundled network elements and transport and termination, based on whether a call or facility was wholly intrastate or jurisdictionally mixed.

We also stated that, in Level 3’s view, the most appropriate statutory classification of ISP-bound traffic was as “telephone exchange service,” rather than as “exchange access.” The Commission recognized as much in *General Communication Inc. v. Alaska Communications Systems Holdings, Inc.*, 16 FCC Rcd. 2834, 3848 (2001), *affirmed in part and rev’d in part*, *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (2002), in which the Commission found that ISP-bound traffic was “local exchange service, of which ISP services are a part pursuant to the ESP exemption.” As the D.C. Circuit recognized in *GTE Service Corporation v. FCC*, 224 F.3d 768, 775 (D.C. Cir. 2000), “the Commission may characterize as ‘exchange service’ even services that, like CMRS, do not use exchanges.” We provided Messrs. Libertelli and Brill with the attached document.

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In accordance with the Commission's rules, I am filing this letter electronically in the dockets identified above.

Sincerely,

/s/

John T. Nakahata

Enc.

**ISP-Bound Traffic (and Other Locally-Dialed Traffic
To an Information Service Provider) is “Telephone Exchange Service”**

Calls to locally-assigned NPA-NXX codes are “telephone exchange service.”

- The “ESP exemption” was a classification decision finding that Enhanced Service Providers (now “Information Service Providers”) are “classified as end users for purposes of the access charge system,” *Access Charge Reform*, First Report & Order, [cite] ¶ 348 (1997), -- “no different from a local pizzeria or barbershop.” *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 D.C. Cir 2002).
- “Telephone exchange service” is defined as either “(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.”
- Indisputably, a call from a calling party to a pizzeria or barbershop that purchases a local business line in the area “covered by the exchange service charge” is “telephone exchange service.” It is a call from one end user to another “within a telephone exchange, or within a connected system of telephone exchanges” with the call “covered by the exchange service charge.”
- Under the ESP classification as an “end user,” a call from a calling party to an Internet Service Provider (or other Information Service Provider) that purchases ISDN-PRI or other state-tariffed business services from the ILEC within the same area “covered by the exchange service charge.” It is also a call from one end user to another “within a telephone exchange, or within a connected system of telephone exchanges” with the call “covered by the exchange service charge.” This is true even if the ISP then cross-connects the ISDN-PRI to a long-haul private line to carry the communication to a distant server.
- The same is true when the Internet Service Provider (or other Information Service Provider) purchases its business service from the CLEC rather than the ILEC. The call is still a call from one end user to another “within a telephone exchange, or within a connected system of telephone exchanges,” or a “comparable service,” with the call “covered by the exchange service charge.”
- The addition of the alternative definition of “telephone exchange service” as “comparable service provided through a system of switches, transmission equipment or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service” – which was added by the 1996 Act – makes clear that “telephone exchange service” is not tied to the ILEC’s exchanges or even the use of an “exchange” at all. As the D. C. Circuit has explained, “the Commission

may characterize as 'exchange service' even services that, like CMRS, do not use exchanges." *GTE Service Corp. v. FCC*, 224 F.3d 768, 775 (D.C. Cir. 2000).

- The Commission recognized that ISP-bound traffic is "telephone exchange service," in *General Communication Inc. v. Alaska Communications Systems Holding, Inc.*, 16 FCC Rcd. 2834, 2848 (2001), *aff'd in relevant part and rev'd in unrelated part*, *ACS of Anchorage Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002). In that case, an ILEC's argued that the Commission cannot require ILECs to separate costs related to ISP-bound traffic to the intrastate jurisdiction because the Commission had exercised jurisdiction over such traffic as jurisdictionally mixed (i.e., containing both interstate and intrastate communications, and therefore within the Commission's Section 201 jurisdiction). The Commission explained that, when an ILEC originates traffic bound to an ISP, "the 'operation at issue here is local exchange service, of which ISP services are a part pursuant to the ESP exemption. Local exchange service is provided under intrastate tariffs." *Id.* In that decision, "local exchange service" can only be synonymous with the statutory term "telephone exchange service."